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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1957

STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA,

Complainants,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO,

Defendants.

No. 2 Original

STATE OF MICHIGAN,

Complainants,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, et al.,

Defendants.

STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI and ARKANSAS,

Intervening Defendants.

No. 3 Original

STATE OF NEW YORK,

Complainant,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, et al.,

Defendants.

No. 4 Original

APPLICATION OF THE STATES OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN AND NEW YORK FOR A REOPENING AND AMENDMENT OF THE DECREE OF APRIL 21, 1930 AND THE GRANTING OF FURTHER RELIEF.

BRIEF IN SUPPORT THEREOF

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STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA,

Complainants,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO,

Defendants.

STATE OF MICHIGAN,

Complainants,

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STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, et al.,

Defendants.

STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI and ARKANSAS,

Intervening Defendants.

STATE OF NEW YORK,

Complainant,

v.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, et al.,

Defendants.

Application of the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York for a Reopening and Amendment of the Decree of April 21, 1930 and the Granting of Further Relief.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The application of the states of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York by their respective attorneys general appearing at the foot of this application respectfully show to the Court that:

I

This application is filed for a reopening and further relief in the above-entitled actions under and pursuant to the provisions of paragraphs 5, 6, and 7 of the decree entered in these causes on April 21, 1930, which decree, among other things, provides:

"1. On and after July 1, 1930, the defendants, the State of Illinois and the Sanitary District of Chicago, are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 c. f. s. in addition to domestic pumpage.

"2. That on and after December 31, 1935, unless good cause be shown to the contrary that said defendants are enjoined from diverting as above in excess of an annual average of 5,000 c. f. s. in addition to domestic pumpage.

"3. That on and after December 31, 1938, the said defendants are enjoined from diverting as above in excess of an annual average of 1,500 c. f. s. in addition to domestic pumpage.

"4. That the provisions of this decree as to the diverting of the waters of the Great Lakes-St. Lawrence system or watershed relate to the flow diverted by the defendants exclusive of the water drawn by the City of Chicago for domestic water supply purposes and entering the Chicago River and its branches or the Calumet River or the Chicago Drainage Canal as sewage. The amount so diverted is to be determined by deducting from the total flow at Lockport the

amount of water pumped by the City of Chicago into its water mains and as so computed will include the run-off of the Chicago and Calumet drainage area.

"5. That the defendant the Sanitary District of Chicago shall file with the clerk of this Court semi-annually on July first and January first of each year, beginning July first, 1930, a report to this Court adequately setting forth the progress made in the construction of the sewage treatment plants and appurtenances outlined in the program as proposed by the Sanitary District of Chicago, and also setting forth the extent and effects of the operation of the sewage treatment plants, respectively, that shall have been placed in operation, and also the average diversion of water from Lake Michigan during the period from the entry of this decree down to the date of such report.

"6. That on the coming in of each of said reports, and on due notice to the other parties, any of the parties to the above entitled suits, complainants or defendants, may apply to the Court for such action or relief, either with respect to the time to be allowed for the construction, or the progress of construction, or the methods of operation, of any of said sewage treatment plants, or with respect to the diversion of water from Lake Michigan, as may be deemed to be appropriate.

"7. That any of the parties hereto, complainants or defendants, may, irrespective of the filing of the above-described reports, apply at the foot of this decree for any or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may

deem at any time to be proper in relation to the subject matter in controversy."

II

A. That by an act passed by the legislature in 1955 of the State of Illinois the name of the Sanitary District of Chicago was changed to the Metropolitan Sanitary District of Greater Chicago, which District comprises and includes the City of Chicago and 106 adjoining municipalities, having a combined total area of 920.14 square miles, said District serving a human population as of 1955 of 4,600,000 and industrial waste equivalent of 3,800,000 people, or a total of 8,400,000 persons.

B. That in 1930, the year in which this Court entered its decree, said District then known as the Sanitary District of Chicago comprised and included the City of Chicago and 54 cities, towns and villages, having a combined total area of 438 square miles, with a population of 3,901,569 as of 1930.

C. That although according to the Special Master's report filed in 1929 with the Court, the then projected human population for 1960 was 5,860,000 persons and that for 1970 was 6,580,000, the present projected human population for the greater and metropolitan Chicago area to be served by said Metropolitan Sanitary District of Greater Chicago, according to a publication recently issued by said District, will increase to 15 or 20 millions in human population in the present foreseeable future.

III

A. That the public water supplies serving the people,

commercial establishments, and industrial plants situated within the boundaries of said District are taken from Lake Michigan by six or more municipalities and numerous industries; that said water after use is discharged as sewage and industrial wastes into local government or District-owned sewers by which said sewage and wastes are conveyed to one of three sewage disposal plants for treatment; that said plants, owned and operated by the said District, have been constructed pursuant to the aforesaid decree issued by this Court as will fully appear from records and files of this Court and the reports filed with the Clerk of this Court by said District until 1938.

B. That said collecting system of sewers are of the so-called "combined" type being required to convey not only sewage and industrial wastes, but during times of storm such amounts of run-off as are permitted to find their way into said collecting system of sewers; that under such conditions, mixtures of sewage and industrial wastes with variable amounts of storm water not entering the sewage disposal plants for treatment are overflowed without treatment or other refinement through regulator-operated relief outlets into the Chicago River or the Sanitary and Ship Canal and its tributary waterways; that all of said overflows, independent of other causes, create unsanitary conditions and noxious odors during certain seasons of the year in said Canal and waterways as the result of this contamination and sludge accumulations; further, that on several occasions in recent years the volume of polluted storm water in said canals was so great as to overflow control gates or locks and escape back into Lake Michigan in violation of the purposes for which the said District was created.

C. That while the said Sanitary District acknowledges that the statute under which it was created imposes upon

it the duty to collect and treat all human sewage and industrial waste produced within its territorial limits, these complainants charge that the said District has not fully and effectively exercised the duties granted it, in that said District has not and is not now collecting all sewage and industrial waste within its jurisdiction, but is permitting volumes of sewage and industrial waste to be discharged untreated to said waterway under both dry weather and wet weather conditions; that the waters contained in the said Chicago River and Sanitary and Ship Canal and its tributary waterways have been, are, and these complainants charge, will continue to be polluted and contaminated to a degree which cannot be expected to be overcome by any amount of additional diversion from Lake Michigan that can be passed through said canals and waterway and still maintain navigation. Further, these complainants charge that as the said service area of the District continues to increase in population, commercial establishments, and industrial plants, accompanied by the resulting increase in sewage, industrial wastes and storm run-off, that the polluted condition of the Chicago River and the Sanitary and Ship Canal will become increasingly aggravated so long as the said District is permitted to attempt to continue to discharge its purified treatment plant effluents and overflow from its combined sewers into the said waterways, these now being the slack-water navigation facilities under control of the Federal Government.

IV

That the Sanitary District through its experts and witnesses who appeared before the Special Master on re-reference outlined a program of constructing sewage treatment

works which would satisfactorily and adequately treat the sewage and industrial wastes as follows:

> "* * * in 1920 a human population of 3,000,000 and a population-equivalent of 1,500,000; in 1925, 3,355,000 human and 1,600,000 population-equivalent; in 1930, 3,710,000 human and 1,700,000 equivalent; in 1935, 4,070,000 human and 1,800,000 equivalent; in 1940, 4,425,000 human and 1,900,000 equivalent; in 1945, 4,785,000 human and 2,000,000 equivalent; in 1950, 5,140,000 human and 2,100,000 equivalent; in 1955, 5,500,000 human and 2,200,000 equivalent; in 1960, 5,860,000 human and 2,300,000 equivalent; and in 1970, 6,580,000 human and 2,500,000 equivalent."
>
> (From Joint Abstract of Record for Hearing upon Exceptions to the Special Master's Report on Re-Reference, pages 509 and 510)

The Sanitary District assured this Court that its treatment works and facilities would be operated in such an efficient manner that the effluent discharged into the Sanitary Canal would in no wise create nuisance conditions which might endanger and injure public health in the area thereof; nevertheless officials and representatives from said Sanitary District and the State of Illinois have on repeated occasions following the entry of this Court's decree been instrumental in the introduction of bills into the Congress of the United States which would authorize an increase in the volume of water diverted from Lake Michigan into said Sanitary Canal beyond the 1,500 c.f.s. permitted by the decree of this Court; that the said increase has been demanded by said District as necessary to further dilute and flush the pollutional wastes discharged into said Canal; that on two

occasions said bills, after having been passed by both houses of the Congress, were vetoed by the President. In the first of said vetoes the President said:[1]

"I have withheld my approval of H. R. 3300 'To authorize the State of Illinois and the Sanitary District of Chicago, under the direction of the Secretary of the Army, to help control the lake level of Lake Michigan by diverting water from Lake Michigan into the Illinois waterway.'

"The bill would authorize the State of Illinois and the Sanitary District of Chicago, under the supervision and direction of the Secretary of the Army, to withdraw from Lake Michigan, in addition to all domestic pumpage, a total annual average of 2,500 cubic feet of water per second into the Illinois waterway for a period of 3 years. This diversion would be 1,000 cubic feet per second more than is presently permitted under a decree of the Supreme Court of the United States dated April 21, 1930. The bill also would direct the Secretary of the Army to study the effect in the improvement in conditions in the Illinois waterway by reason of the increased diversion, and to report to the Congress as to the results of the study on or before January 31, 1957, with his recommendations as to continuance of the increased diversion authorized.

"The bill specifies that the diversion would be authorized in order to regulate and promote commerce, to protect, improve, and promote navigation in the

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[1] See "Documents on the Use and Control of the Waters of Interstate and International Streams," published by the U. S. Department of the Interior, Great Lakes Litigation, pp. 590, 591, 592.

Illinois waterway and Mississippi Valley, to help control the lake level, to afford protection to property and shores along the Great Lakes, and to provide for a navigable Illinois waterway. No mention is made of possible improvement of sanitary conditions or increase in hydroelectric power generation on the waterway.

"I am unable to approve the bill because (1) existing diversions are adequate for navigation on the Illinois waterway and Mississippi River, (2) all methods of control of lake levels and protection of property on the Great Lakes should be considered before arbitrarily proceeding with the proposed increased diversion, (3) the diversions are authorized without reference to negotiations with Canada, and (4) the legitimate interests of other States affected by the diversion may be adversely affected. I wish to comment briefly on each of these points.

"I understand that waterborne traffic on the Illinois waterway has grown in the last 20 years from 200,000 tons to 16,000,000 tons annually. The Corps of Engineers advises, however, that the existing diversions of water are adequate for navigation purposes in the Illinois waterway and the Mississippi River. Surveys are now under way by the International Joint Commission and the Corps of Engineers to determine the best methods of obtaining improved control of the levels of the Great Lakes and of preventing recurrence of damage along their shores. Reasonable opportunity to complete these surveys should be afforded before legislative action is undertaken.

"The diversion of waters into and out of the Great Lakes has historically been the subject of negotiations with Canada. To proceed unilaterally in the manner

proposed in H. R. 3300 is not wise policy. It would be the kind of action to which we would object if taken by one of our neighbors. The Canadian Government protested the proposed authorization when it was under consideration by the Congress and has continued its objection to this bill in a note to the Department of State dated August 24, 1954. It seems to me that the additional diversion is not of such national importance as to justify action without regard to the views of Canada.

"Finally, as is clear from the report of the Senate Committee, a major purpose of the proposal to divert additional water from Lake Michigan into the Illinois waterway is to determine whether the increased flow will improve existing adverse sanitation conditions.

The waters of Lake Michigan are interstate in character. It would seem to me that a diversion for the purpose of one State alone should be authorized only after general agreement has been reached among all the affected States. (Emphasis supplied)

Officials of several States adjoining the Great Lakes, other than Illinois, have protested approval of the bill as being contrary to their interests and not in accord with the diversion authorized under the 1930 decree of the Supreme Court. Under all of these circumstances, I have felt that the bill should not be approved."

And complainants are informed and believe, and charge the facts to be, that unless the Sanitary District and the State of Illinois are further enjoined in the manner and to the extent hereinafter set forth in the prayer, the State of Illinois and the Sanitary District will continue to demand an increase in the amount of diversion, contrary to the just

rights of the complainants, in violation of the rights and obligations of the Federal Government in the conduct of international affairs, and in the maintenance and operation of the aforesaid Canal as a Federal waterway.

V

That by the decree entered by this Court on April 21, 1930, the Sanitary District was allowed to divert from Lake Michigan into the Sanitary Canal an annual average not to exceed 1,500 c.f.s. for the purpose of maintaining navigation in the Port of Chicago and the connecting Illinois waterway in addition to the quantity of water abstracted from Lake Michigan for the purpose of domestic pumpage; that in 1939, at the time the diversion was fully reduced pursuant to the terms of said decree the total diversion of 1,500 c.f.s. for navigation plus domestic pumpage amounted to 3,110 c.f.s.; the diversion increased to 3,205 c.f.s. in 1954, and to 3,500 c.f.s. in 1956; complainants aver that as the population of greater Chicago increases, as the Sanitary District takes in larger areas, and as the industrial development in the geographical area served by the Sanitary District continues to expand, the volume of water to be abstracted from Lake Michigan and discharged into the Sanitary Canal by the Sanitary District as domestic pumpage will increase beyond the limits that were estimated at the time the Court entered its decree in 1930; in fact, this Court, in foreseeing that the withdrawals for domestic pumpage might be shown to be excessive, recognized the right of complainants to seek modification of the decree and stated:

"If the amount withdrawn should be excessive, it will be open to complaint. Whether the right for domestic use extends to great industrial plants within

the District has not been argued but may be open to consideration at some future time."

(281 U. S. 179 at page 200)

VI

And complainants are informed and believe, and charge the facts to be, that many industrial plants have established themselves within said District since the date of said decree, that many were located within the municipalities annexed by the Sanitary District since said decree; and, in fact, said Sanitary District openly advertises for and attracts many new and additional commercial and industrial enterprises, all of which are substantial users of water; that with the projected growth in population and industry within the next 20 years to 15 or 20 million persons the quantities of water abstracted from Lake Michigan in the form and guise of "domestic pumpage" and permanently diverted from the Great Lakes Basin will become more and more excessive, to the irreparable harm and injury of the complainants.

VII

A. And complainants aver that the capacity of the present Canal as constructed by the United States Corps of Engineers in 1933 is such that it cannot accommodate sufficient dilution to enable it to adequately carry the increased pollutional load which will be discharged into the slack waters of said Canal as a result of the sewage and industrial wastes generated by the aforesaid projected increases in population and industry.

B. In addition to the greater hazards to public health thereby created, the complainants will be further injured by the continued lowering of the water levels of the Great

Lakes with the resultant detriment to their navigational, power development and recreational uses.

C. Further the decrease in the volume of the outflow from the great lakes through the hydro-electric plants at Niagara and the International Rapids will cause substantial losses in power and generation and corresponding financial loss particularly to the State of New York and such other states as are inter-connected with the New York power grid.

VIII

And complainants further aver that to allow the State of Illinois and the Sanitary District to continue to abstract increasing quantities of water from the Great Lakes Basin and divert it into another basin under the form and guise of "domestic pumpage" will cause complainants great and irreparable harm to their rights as sovereign states and as *parens patriae* of the rights of their citizens. Since the entry of this Court's decree in 1930 the following events have occurred which render it most imperative that *NO WATER* be abstracted from the Great Lakes Basin by the State of Illinois and the Sanitary District under the form and guise of "domestic pumpage," and thereafter diverted to another basin, among which are the following:

(1) The Legislature of the State of New York has enacted the Power Authority Act creating the Power Authority of the State of New York as a corporate municipal instrumentality of the State, and directing it to effectuate the declared policy of the State of New York to develop the inalienable natural resources of the State in the St. Lawrence and Niagara Rivers for commerce and navigation and for hydro-electric power. (Laws of 1931, Chapter 772, as amended; Public Authorities Law Sec. 1000, et seq.)

(2) The governments of the United States and Canada submitted to the International Joint Commission established under the 1909 Treaty applications for its approval of the construction jointly by entities to be designated by the respective governments of certain works for the development of power in the International Rapids section of the St. Lawrence River. (U. S. Dept. of State Bulletin, Vol. 27, Dec. 29, 1952, pp. 1019-1024.)

(3) The International Joint Commission issued an order approving the construction of the aforesaid power works. (St. Lawrence Seaway Manual, Sen. Doc. No. 65, 83rd Cong. 2nd Sess.)

(4) (a) The Federal Power Commission issued to the New York Power Authority a license under Section 4-e of the Federal Power Act for the construction, operation and maintenance of certain power facilities in the International Rapids section of the St. Lawrence River. (Op. No. 255 of the Federal Power Commission, FP 2000.)

(5) The President of the United States, by executive order, declared the New York Power Authority to be the designee of the government of the United States of America for the construction of the works referred to in the order of approval of the International Joint Commission. (18 Fed. Reg. 7005, Nov. 6, 1953.)

(6) The New York Power Authority has issued bonds in the sum of $335,000,000, backed by revenue to be derived from the sale of power and not by public credit, to finance its share of the construction of the aforesaid power works in conjunction with the designee of the Canadian government, Hydroelectric Power Commission of Ontario.

(7) The designees of the governments of the United

States and Canada are now in the process of completing the aforesaid power works.

(8) The New York Power Authority is now in the process of contracting for the sale of all power that can be generated by its part of such works and the rates for the sale of such power have been initially fixed on the basis of anticipated power generation resulting from the stream flow as fixed by the decree of April 21, 1930.

(9) By act of Congress there was created the St. Lawrence Seaway Development Corporation with authority to construct in United States territory deep water navigation works substantially in accordance with the "Controlled single stage project 238-242" set forth in the report of the Canadian Temporary Great Lakes-St. Lawrence Basin Committee and the United States St. Lawrence Advisory Committee. (Public Law 358, 83rd Cong.)

(10) The Seaway Corporation is now engaged in constructing the aforesaid deep water navigation works, and the canals, locks, and channel improvements it is making are based upon the historical stream flow.

(11) The United States and Canada signed on February 27, 1950 and put into effect a Treaty Concerning the Uses of the Waters of the Niagara River, which terminated the provisions of the 1909 Treaty only in respect to the waters of the Niagara River, provided for the construction of certain remedial works in the Niagara River to preserve and enhance the beauty of Niagara Falls, specified the amount of water that might be diverted from the river for power purposes, stated that the waters available for power purposes should be divided equally between the United States and Canada, that representatives be designated to determine the amount of water avail-

able for purposes of the Treaty, and that until such time as there are facilities in the territory of one party to use its full share of the diversion waters for power purposes, the other party may use the portion of that share for use of which facilities are not available. (T I A S 2130.)

(12) Canada is completing construction on its side of the Niagara River of new facilities, by the use of which together with some old facilities, which it will ultimately abandon, it is using its share and part of the United States' share of the waters made available for power purposes pursuant to the terms of the 1950 Treaty. When its new facilities are completed, it will be able to use its and the United States' full share of the waters of the Niagara River until facilities are available for use in the United States of the United States' share of the waters.

(13) Since the beginning of Seaway construction Congress has appropriated nearly 100 million dollars for the deepening of connecting channels on the upper lakes, without which the Seaway project would be valueless to Michigan, Wisconsin, Illinois and Minnesota. This work is now in progress.

(14) The 85th Congress enacted Public Law 85-159 (approved August 21, 1957; 71 Stat 401), authorizing and directing the Federal Power Commission to issue to Power Authority of the State of New York a license for a power project on the Niagara River to utilize all of the waters thereof which it is permissible to divert for power purposes in the United States under the terms of the February 27, 1950 treaty between the United States and Canada. (1 U.S.T. 694.)

(15) By order issued September 19, 1957 the Federal Power Commission issued to the Power Authority of the

State of New York a license under the provisions of Section 4 (e) of the Federal Power Act and Public Law 85-159 (71 Stat 409) for the construction, operation and maintenance of the Niagara Project No. 2216 located on the Niagara River in the vicinity of Niagara Falls for the purpose of developing all of the waters of the Niagara River which it is permissible to divert under the terms of the 1950 treaty between the United States and Canada.

IX

Complainants aver that recent studies made by the United States Corps of Engineers have established that a diversion of 1,500 c. f. s. is adequate to maintain navigation in the Port of Chicago and the Illinois waterway. It is not the intention of complainants to challenge this diversion of 1,500 c. f. s. herein, but complainants do aver that no further diversion in the guise of "domestic pumpage" or otherwise is necessary for navigational purposes, and the complainants do challenge and demand a cessation of diversion of water for "domestic pumpage" from the Great Lakes Basin.

X

In further support of their allegation that no water should be diverted and permanently abstracted from the Great Lakes Basin for "domestic pumpage," complainants aver that it is possible and feasible to return the effluent from the Sanitary District's treatment plants to Lake Michigan without endangering the domestic water supply taken from said lake by the City of Chicago because of the many advances and developments which have taken place since 1930 in the science and technology of the treatment and purification of sewage and industrial wastes; that at

the present time it is the claim of the Sanitary District that its treatment works and facilities provide up to 90% treatment of all of the sewage and industrial wastes collected in said District; that said 90% treated effluent after proper chlorination where necessary could be returned to the waters of Lake Michigan through pipes and tunnels running from said treatment plants to appropriate locations in Lake Michigan, whose waters are in such volume and contain such a high content of dissolved oxygen as to render said prechlorinated effluent innocuous immediately upon its diffusion throughout a large area of said waters. Complainants further aver that all of the municipalities except Chicago lying along the Great Lakes and receiving their domestic water supply therefrom, both American and Canadian, after treatment return their "domestic pumpage" to the waters of the lake from which such "domestic pumpage" is abstracted in the manner herein related without experiencing any danger or hazard to their domestic water supply and public health.

XI

And complainants aver that the classes of injuries found by the Special Master to have been sustained by the complainants because of the unlawful diversion of water by the State of Illinois and the Sanitary District of Chicago (which findings were approved by this Court) still continue to exist; and said injuries will be augmented because of the ever increasing diversion of water from the Great Lakes Basin; and the damages to complainants resulting from said diversion will be multiplied in direct proportion to the development of the navigational facilities of the St. Lawrence Seaway and the connecting channels and the further development of the greatly expanded facilities for the generation of hydro-electric power.

WHEREFORE COMPLAINANTS PRAY:

(1) That respondents State of Illinois and the Metropolitan Sanitary District of Greater Chicago be perpetually enjoined from diverting any water used for domestic pumpage from the Great Lakes Basin, and that it be ordered and directed at a time and manner to be fixed by this honorable Court to return to the waters of Lake Michigan all purified effluent of the sewage treatment plants of the said District, other than the diversion of 1,500 c. f. s. for navigation.

(2) That this honorable Court appoint a Master to take testimony and make recommendations and findings as to the time and manner in which the return of the purified effluent to Lake Michigan shall be accomplished.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION TO AMEND DECREE OF APRIL 21, 1930 ON BEHALF OF THE STATES OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN AND NEW YORK.

I

Introduction

Despite the warnings of this Court expressed in its opinions and decrees with respect to the diversion of water from Lake Michigan by the State of Illinois and its creature, the Sanitary District of Chicago (recently changed to the Metropolitan Sanitary District of Greater Chicago), these defendants still suffer from an insatiable thirst for more diverted water for a purpose which this Court has declared to be constitutionally inadmissible, namely, sanitation.[1] This voracious appetite brings to our minds the unappeasable hunger of the beast encountered by Dante in the first canto of his Inferno.[2]

> "That never doth she glut her greedy will,
> And after food is hungrier than before."

Fearful that these insistent and seemingly unappeasable demands for more diverted water by the Sanitary District of Chicago might cause or bring about, unless opposed by the complainants, a situation from which they could not be rescued even by this Court, the complainant States join in filing the instant petition with this Court. We have felt it to be imperative that this be done before the course of events, if allowed to proceed unchecked, might make it

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[1] Wisconsin v. Illinois 278 U.S. 367; 281 US 179

[2] Longfellow Translation, Inferno, Canto I, lines 98, 99.

difficult, if not impossible, even for this Court, to turn back the clock of time.

II

History

By way of history, we call the Court's attention to the brief that was filed on behalf of the states of Wisconsin, Minnesota, Ohio, Pennsylvania, New York, and Michigan, dated the 15th day of September, 1950, in support of Motion to Dismiss Petition for Interpretation and Clarification of Decree of April 21, 1930. This brief contains an excellent and succinct account of the legal history of this protracted and extensive litigation. Since that date only one additional proceeding has occurred consisting of the petition filed by the State of Illinois in November 1956. In these proceedings the State of Illinois petitioned for a temporary modification of the decree "to permit a diversion of ten thousand cubic feet of water per second from the Great Lakes-St. Lawrence system or watershed, in addition to domestic pumpage, for a period of one hundred days following the entry of the Court's order authorizing such modification, within which time it is anticipated that the impairment to navigation which now exists on the Mississippi River and the Illinois Waterway can and will be ameliorated."

The states of Minnesota, Ohio, New York, Pennsylvania and Michigan, appreciating the emergency that was facing the commerce on this waterway because of the drought that continued throughout the summer of 1956 in the Mississippi and Illinois watersheds, after due deliberation, decided to consent to allowing a temporary increased diversion. In consonance with this decision of the complainant States (with the exception of Wisconsin), the State of

Michigan on pages 6 and 7 of her brief dated December 7, 1956, stated that it did not oppose the petition of the State of Illinois, provided that the State of Illinois would stipulate and agree to the inclusion of the following conditions in any order of this Court:

"1. The State of Michigan does not waive any position which it has heretofore taken respecting the injurious or detrimental affect (*sic*) of diversion of water from the Great Lakes-St. Lawrence system and expressly reserves the right to take such position in any future proceedings concerning this subject.

"2. The granting of any relief upon the present petition of the State of Illinois will not be used as a precedent by any party for any future request for any additional temporary diversion in excess of the amounts fixed by this Court in its decree of April 21, 1930.

"3. The amount of increased diversion shall be restricted to such amount as may be necessary, but shall not exceed 8,500 cubic feet per second.

"4. The time during which such increased diversion may be made shall be limited to such period as may be necessary, but not exceeding 100 days from the date of entry of the Court's decree of modification.

"5. The amounts and times of diversion as may be necessary to carry out the decree of temporary modification shall be determined by the Corps of Engineers, United States Army.

"6. Any increased diversion authorized by the temporary decree of modification shall be and remain under the supervision and control of the Corps of

Engineers, United States Army during the period for which such increased diversion may be authorized.

"7. After the expiration of the period for which the increased diversion may be authorized all the provisions of the decree of this Court heretofore entered in this action on April 21, 1930 (281 U. S. 696) shall be and remain in full force and effect until further order of the Court.

"8. The relief granted is based solely upon the petition of the State of Illinois and does not constitute an acknowledgment or recognition of any cause for, or right to relief which may be asserted by any other party to these causes.

"9. There is no need for any clarification of the decree of April 21, 1930.

"10. The fact that the State of Michigan does not oppose the petition of the State of Illinois for temporary modification of Paragraph 3 of the Decree of April 21, 1930, shall not be construed as an admission or evidence of the right of the State of Illinois, or any of its political subdivisions or other agencies, to divert any waters of the Great Lakes-St. Lawrence system except as provided in the Decree of April 21, 1930, as modified herein."

The State of Wisconsin, in a short memorandum motion dated December 5, 1956, not only refused to join in the granting of the petition but moved that the petition of the State of Illinois be dismissed.

The Solicitor General of the United States, J. Lee Rankin, filed a Memorandum on Behalf of the United States

as Amicus Curiae, in which was pointed out the interests of the United States both with regard to the paramount power of Congress in the regulation of navigation and the treaties between the United States and Canada which affected the total problem of diversion.

During the pendency of this petition before this Court, the Sanitary District of Chicago filed a motion and attempted to inject itself into the scene by asking again for a clarification of the decree of April 21, 1930, or in the alternative for the appointment of a Special Master. The states of Wisconsin, Ohio, Michigan, and New York filed motions to dismiss the foregoing motion of the Metropolitan Sanitary District of Greater Chicago, pointing out that the matter then pending on the petition of the State of Illinois for increased diversion for navigation purposes was of no concern to the Sanitary District. The records of this Court will show that the motion of the Sanitary District was dismissed; that the Court granted the petition of the State of Illinois to a modified extent sufficient to relieve the emergency conditions that existed in the Illinois and Mississippi waterways.

III

Discussion of Complainants' Present Petition

By an act of the Illinois legislature, the Sanitary District of Chicago changed its name in 1955 to the Metropolitan Sanitary District of Greater Chicago. Apparently this was made necessary because of the tremendous increase in size, both of the area served by the District as well as the population and industries which it encompasses. At the time the Court entered its decree in 1930 this District com-

prised an area of 438 square miles serving the City of Chicago and 54 additional municipalities, and having a combined population equivalent of 3,901,569—human and industrial.

According to the Special Master's report filed in 1929 with this Court, it was projected that in 1960 the then Sanitary District would be serving a human population of 5,860,000 and an industrial waste equivalent population of 2,300,000; that in 1970 the then District would be serving a human population of 6,580,000 and an industrial waste equivalent population of 2,500,000. We emphasize these estimates as having been based on the growth trends of the District as it existed in 1930.

At the present time, since the assumption of its more comprehensive title, this District is now serving a human population of 4,600,000 and an industrial waste equivalent population of 3,800,000, making a total of 8,400,000. We point out that since 1930 the District has doubled in population, in area, and in municipalities served by it. Further, according to reports and prospectus published recently by the District, it is stated that the population of this District is expected to increase to 15 to 20 millions in human population alone in the immediately foreseeable future.

Inasmuch as the District has not filed any reports with this Court since 1938, the complainant States have been at a disadvantage in determining what kind and how efficient have been sewage treatment operations conducted by the Sanitary District. It has made public claims that it gives its sewage and industrial wastes from 85% to 90% treatment, including the removal of all solids. The Sanitary District is not subject to the authority of the Illinois Sani-

tary Water Board, as evidenced by the following language contained in the state statute creating the said board:[3]

> "Nothing in this Act contained shall apply to or be effective within the territorial limits of or be construed in any manner to affect the property, real, personal or mixed, wherever situated, or the channels, adjuncts and additions, drains, ditches and outlets, and their use, operation and maintenance and the right to the flow of water therein, and in rivers, streams and navigable waters connected thereto, for sewage, dilution, nor affect the jurisdiction, rights, powers, duties and obligations of any existing sanitary district which now has a human population of one million or more within its territorial limits. 1929, June 25, Laws 1929, p. 386, § 16; 1945, July 25, Laws 1945, p. 382, § 1."

Consequently, the presently known Metropolitan Sanitary District of Greater Chicago is a kingdom unto itself, from which even the State of Illinois, its creator, has excluded itself. Despite this legal iron curtain with which the Sanitary District has surrounded itself, the complainant States have been able to secure information concerning the operations of the sewage collection system and treatment works constructed and maintained by the District, which information is indicative of the laxity with which these works are operated, as well as their ineffectiveness in doing a proper and adequate job of sewage and industrial waste treatment.

During the years, the District, in deciding on a course of action in the methods and manner of handling this sanitation problem, has committed two grievous errors:

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[3] Smith-Hurd Ill. Ann Stat, Ch. 19, § 144.

(1) Many years ago, before this controversy reached this Court, the District chose to dispose of its untreated sewage by discharging it to the Sanitary and Ship Canal. By diverting large volumes of fresh clean water from Lake Michigan, the District hoped to not only dilute the polluted waters but also to flush them on down the Illinois waterway. There is no need here to take time and space in describing the "mess" which the District had created in its own back-yard. Needless to say, in an attempt to ameliorate these conditions, the District was forced to divert greater and greater volumes of water from Lake Michigan.

Even with the completion of the sewage treatment works, compelled by the decree of this Court of 1930, this District has not resolved its sewage disposal problem. It still claims that it needs greater quantities of diverted water for diluting the effluent which is discharged from its sewage treatment plants. Not only the records of this Court, but the records and archives of Congress are replete with insistent and repeated demands for greater quantities of diverted water for dilution purposes. Consequently, it would seem that the method chosen by the District of discharging the effluent from its sewage treatment plants into the waters of the Sanitary and Ship Canal does not meet the requirements of today, any more than the Sanitary Canal met the requirements in 1930 and prior years. The reason why the present waterway is not capable of doing a satisfactory job of dilution is set forth in this petition, particularly Paragraph III thereof.

The gist of the trouble is:

The Sanitary and Ship Canal, a federalized waterway, through a system of locks, operates as a slack water navigation facility. Such a system requires a minimum of

velocity in order that large traffic may safely utilize the facility.

This canal system is also the receiving waters for all effluents discharged by the District's sewage treatment plants, numerous trade waste, as well as vast volumes of storm water which accumulates in the District's sewer system during periods of surface runoff. Storm water overflow from such a "combined system" is mixed with the raw sewage and when such a mixture is discharged untreated to a waterway, it carries large quantities of solids and biochemical oxygen demand substances.

The effect of these operations as practiced by the District has resulted in creating nothing more than an "open sewer" of the Sanitary and Ship Canal. The present pollution loading on the waters of this slack water canal system is so great that no amount of dilution water diverted from Lake Michigan can adequately satisfy the biochemical oxygen demand of this "open sewer" and still allow utilization of the canal for navigation purposes. It should be noted further that the low velocities of the waterway are not sufficient to flush or move out the solids resulting from these "operations" of the District. Consequently these solids settle out as sludge deposits at numerous points along the waterway and aggravate further the pollution problem.

Actually, the District, in following these practices, is utilizing the Sanitary and Ship Canal as a huge disposal adjunct or facility for the collection and treatment system it has failed to provide as ordered by the 1930 decree of this Court.

Although an inspection of the finally treated effluent visible in the last stages of treatment at the sewage dis-

posal plants indicates that such effluent is substantially colorless, containing a minimum of suspended matter and but 10% or less of the incoming raw sewage and wastes; nevertheless it was observed that the waters of the Canal contained numerous types of solids and as late as November 11, 1957 in the vicinity of at least two oil refineries, the water contained the acrid odor of oil refinery wastes and the Canal banks were covered with oil sludge deposits.

(2) Faced with the sanitation problem created by rapidly increasing population, booming industries and an ever increasing area of service, the District has committed its second error. It has failed to provide and construct adequate sewage and industrial waste collection and treatment facilities to match this growth. Yet on the other hand, it has encouraged and enticed industrial expansion and accepted the sanitation problems of contiguous municipalities by connecting their sewers to its already overloaded collection system, further aggravating the basic problem of complete collection and treatment of the sewage and industrial waste of "Chicagoland."

Simply put, the District, after this court decree of 1930, reluctantly constructed the sewage treatment facilities as ordered. By 1939 these works were finally completed and in operation. However, since then the population and service area of the District has more than doubled and has far exceeded the estimated population and industrial growth made by it in the early 1930's. Yet the District looks backward to its past history for the answer—discharge the wastes, some treated, others not, to the Sanitary and Ship Canal, dilute them with Lake Michigan water and flush the "mess" on down the waterway into the Mississippi Basin. This was and is their "answer" to this basic problem. Not really very different than prior to 1930. True, the District operates several large sewage

treatment plants and does a reasonably efficient job at these works. Yet this waterway, referred to on federal navigation maps as the Sanitary and Ship Canal, remains grossly polluted, and consequently the District continues by every means at its command to seek greater amounts of dilution water from the Great Lakes Basin.

We say most emphatically that so long as the District is allowed, through the decrees of this Court, to discharge the effluent coming from its sewers and sewage disposal plants directly into the waters of this Canal together with storm water overflows and other untreated waste, the District will never solve this problem but will merely augment the unsanitary conditions which it creates; and as a result there will be heard insistent and repeated demands for more water from Lake Michigan with which to dilute the contaminated waters of the Canal, as well as to flush away the sludge deposits which have settled on its bottom and banks.

Solution of the District's Sewage Disposal Problem Propounded by Complainant States

It should be recalled that in the second Master's report the Sanitary District of Chicago convinced Special Master Charles Evans Hughes that it be allowed to divert into the Sanitary Canal not only the 1,500 c. f. s. needed for navigation, but also all of its "domestic pumpage." The complainant States filed objections against allowing the Sanitary District to discharge into the Canal the water comprehended under the term "domestic pumpage," and they proposed that the water in the Canal be reversed so as to be returned to Lake Michigan. Obviously, this proposal was impractical at that time, particularly since the District in 1930 operated little, if any, sewage disposal facilities. However, the Court in its opinion indicated that

it would leave the matter open for further consideration, and it is on the basis of this fact that the complainants have filed the instant petition.

What is "domestic pumpage"?

The City of Chicago through its waterworks abstracts water from Lake Michigan and, after filtration and treatment, distributes it to all its users for residential, commercial and industrial purposes. Ultimately this water finds its way into the sewers which are operated by and under the control of the Sanitary District. Obviously, as the population of Chicago and the municipalities in its periphery grow, the area served increases, and industrial development continues upward, greater quantities of water will be required to satisfy the needs of "domestic pumpage." At the present time approximately 1,800 c. f. s. is extracted for this purpose, and it is conceivable, certainly, that with the growths that have been projected, this amount will double and treble within the next fifteen to twenty years.

Under the decree of this Court of 1930, there is no limit to the amount of "domestic pumpage" which the City of Chicago may abstract from the waters of Lake Michigan for domestic, commercial and industrial uses, nor do the complainant states contend that there should be any such limitation. As a riparian owner on the Great Lakes, the State of Illinois has an undoubted right to abstract from Lake Michigan such water as it requires for the use of the inhabitants which reside within the basin comprising the Great Lakes, and we might not even quarrel with allowing even those residing outside, but within the District's service area, to make use of such water. However, the people of Chicago and its surrounding municipalities should not be allowed to abstract water from Lake Michigan under the guise of "domestic pumpage," and then after having used

it and purified the resulting sewage, divert it to another and different basin. We assert (and we believe this assertion cannot be contradicted) that every municipality situated on the shores of any of the Great Lakes returns its so-called "domestic pumpage" back to the waters of the lake from which it is taken after treatment and chlorination, when necessary. Chicago and its surrounding municipalities seem to assume that they are different, that their case is so special that they should be allowed to divert the treated effluent into another drainage water basin through the Sanitary Canal and waterway. If the cities of Milwaukee, Cleveland, and Toronto are able to return their treated effluent back to lakes Michigan, Erie and Ontario, respectively, without suffering from any deleterious results, we cannot see any logical reason why Chicago should not be compelled to do likewise. If after due inquiry and consideration by this Court it should be decided that the Metropolitan Sanitary District of Greater Chicago be compelled to return its fully treated effluent back to Lake Michigan, as is done by every municipality in the Great Lakes Basin, several salutary things will be accomplished:

(1) The Basin will receive all of the water which was abstracted through "domestic pumpage," and thus levels of the Great Lakes-St. Lawrence Basin will be restored to and maintained at the level which is their due.

(2) The Sanitary District will be spurred to treat its sanitary and industrial wastes properly and adequately to the end that the source of water supply used by the City of Chicago will not be endangered or contaminated. This is presently done by every municipality on the Great Lakes.

Sanitary District Has No Right to Divert Its Treated Effluent into the Sanitary Canal — It Should be Made to Return Such Effluent to the Great Lakes Basin

It is difficult for the complainant States to understand upon what legal or equitable doctrine can the State of Illinois and the Sanitary District rely to support its insistence that it divert "domestic pumpage" into the Canal rather than return it to the Lake except as the exigencies existing at the time the Court entered its decree in 1930 made impracticable *at that time and under the conditions then prevailing.*

If we are to accept as factually true and legally sound the reasoning of Secretary of War Henry L. Stimson, contained in his denial of the application of the Sanitary District at Chicago, in 1913, for diversion of 10,000 cubic feet per second, in his day, then today this reasoning is even more compelling. The Secretary stated, among other things:[4]

> *"In a word, every drop of water taken out at Chicago necessarily tends to nullify costly improvements made under direct authority of Congress throughout the Great Lakes, and a withdrawal of the amount now applied for would nullify such expenditures to the amount of many millions of dollars, as well as inflict an even greater loss upon the navigation interests using such waters.*
>
> "On the other hand, the demand for the diversion of this water at Chicago is based solely upon the needs of that city for sanitation. * * *
>
> "* * *

[4] The Chicago Water Diversion Controversy, Marquette Law Review, Vol. 30, December 1946, No. 3, pp. 155, 157.

"* * * The evidence indicates that at bottom the issue comes down to the question of cost. Other adequate systems of sewage disposal are possible and are in use throughout the world. The problem that confronts Chicago is not different in kind but simply larger and more pressing than that which confronts all of the other cities on the Great Lakes, in which nearly three millions of the people of this country are living. The urban population of those cities, like that of Chicago, is rapidly increasing, and a method of disposition of their sewage which will not injure the potable character of the water of the Lakes must sooner or later be found for them all. The evidence before me satisfies me that it would be possible in one of several ways to at least so purify the sewage of Chicago as to require very much less water for its dilution than is now required by it in its unpurified condition. A recent report of the Engineer of the Sanitary Commission (October 12, 1911) proposes eventually to use some such method but proposes to postpone its installation for a number of years to come, relying upon the present more wasteful method in the meanwhile. It is manifest that so long as the city is permitted to increase the amount of water which it may take from the Lakes, there will be a very strong temptation placed upon it to postpone a more scientific and possibly more expensive method of disposing of its sewage. This is particularly true in view of the fact that by so doing it may still further diminish its expenses by utilizing the water diverted from the Lakes for water power at Lockport. But it must be remembered that for every unit of horsepower realized by this water at Lockport, four units of similar horsepower would be produced at Niagara, where the natural conditions are so much more favorable. Without, therefore, going into further detail in a discussion of this question, I feel clear that no such case of necessity has

been presented by the evidence before me as would justify the proposed injury to the many varied interests in the great waterways of our lakes and their appurtenant rivers."

Many great and important events and developments have occurred in the Great Lakes-St. Lawrence Basin since 1913, and in fact since 1930, which make it even more imperative that every drop of water reaching this Basin should be allowed to remain therein. Some of them are outlined in Paragraph VII of our petition and this Court cannot but help to take judicial notice of the great surge of industrial development that has taken place along the shores of the Great Lakes. The present construction of the St. Lawrence Waterway running into hundreds of millions of dollars through the joint action and efforts of Canada and the United States, the construction of tremendous hydro-electric power works on the Niagara and on the St. Lawrence River by the State of New York jointly with the Province of Ontario, the deepening of the connecting channels between lakes Erie and Huron, and the expansion of lock facilities at Sault Ste. Marie during World War II,—these are but a few of the events which have taken place, which we believe should move this Court to a re-evaluation of the terms of the decree of 1930. If as Secretary Stimson stated in 1913, and as Special Master Hughes reported, every drop of water extracted from and permanently lost to this Basin brings about nullification of the value of works running into hundreds of millions of dollars, then it is the height of absurdity to permit the Sanitary District of the State of Illinois to deprive this Basin of water which legally and equitably belongs therein, on the specious plea that it will cost money to do that which every municipality except Chicago on the Great Lakes has been and now is doing, namely, returning their treated effluent to the Basin from which it came. Exactly what will be required to be done on

the part of the Sanitary District in the rearrangement of its collection facilities and in the construction of works and tunnels to accomplish the aforesaid purpose, is a matter which undoubtedly this Court through a Master would like to inquire into and consider. However, it is the position of the complainant States that regardless of the inconvenience and cost to be borne by the State of Illinois and the Sanitary District, they should be compelled to restore to the Great Lakes Basin the water which they are presently extracting as "domestic pumpage," and the greater and increasing quantities which they will unquestionably extract in this form during the not too distant future.

This Court, Through a Special Master, if Necessary, Should Inquire into and Find Answers To the Following Questions:

The complainant states would suggest to the Court that should a Special Master be appointed some of the issues confronting him would be the following:

(1) To what extent are present unsatisfactory conditions in the Chicago Sanitary and Ship Canal created by uncollected and untreated sewage or industrial wastes originating in the Sanitary District.

(2) To what extent are present unsatisfactory conditions within said Canal caused by industrial effluent from industries located within the District whose use of water cannot be termed as "domestic pumpage" within the intent and meaning of the 1930 decree.

(3) To what extent can the present treatment of sewage and industrial wastes be increased so as to reduce the demand for more diverted water for dilution purposes.

(4) What means of correcting unsatisfactory conditions in the Ship Canal are available and can be made use of other than additional diversion of water from Lake Michigan, such as:

(a) Physical removal of present sludge deposits in canals and waterways;

(b) Supplementing flow in Ship Canal from upstream storage of water in the Des Plaines River Basin;

(c) Aeration of the water in the Ship Canal;

(d) Any other alternates that might be conceived by sanitary engineers and scientists.

(5) Should a Permanent Master be appointed with full authority granted by this Court to maintain surveillance over the conduct and operation of the facilities maintained by the Sanitary District, which Master shall have authority to receive and examine periodic reports from the District, to make inquiry at all reasonable times and occasions concerning not only the accuracy of said reports but also concerning the manner and efficiency with which the Sanitary District operates and maintains its sewage disposal facilities; said Master making all of such information received by him available to the complainant states.

(6) Under what terms and conditions shall the Sanitary District of the State of Illinois be compelled to return the treated effluent of its sewage disposal plants back to the waters of Lake Michigan. Undoubtedly, this will entail the construction of expensive facilities and a time schedule should be determined after considering the exigencies that exist at the present time.

The enumeration of the foregoing issues, of course, does

not preclude the consideration of and inquiry into any other pertinent issues that may arise.

The Diversion of "Domestic Pumpage" into the Ship Canal Is Not Necessary to Maintain Navigation Therein.

In Paragraph IX of this petition, the complainant states allege that it is not their intention to challenge the diversion of 1,500 c.f.s. permitted by the decree of 1930 for the purpose of maintaining navigation in the Sanitary and Ship Canal, but they do challenge the diversion of any volume of water in addition thereto in the form of "domestic pumpage" under the pretext that such is necessary to maintain navigation in this Canal.

It should be noted that in the memorandum issued by Secretary of War Stimson in 1913, it is stated:[5]

> "* * * The Chief of Engineers reports that so far as the interests of navigation alone are concerned, even if we should eventually construct a deep waterway from the Great Lakes to the Mississippi over the route of the Sanitary Canal, the maximum amount of water to be diverted from *Lake Michigan need actually be not over 1000 feet per second* or less than a quarter of the amount already being used for sanitary purposes in the Canal. This estimate is confirmed by the report of the Special Board of Engineers on the deep waterway from Lockport, Illinois, to the mouth of the Illinois River, dated January 25, 1911. It is also confirmed by the practical experience of the great Manchester Ship Canal in England. From the standpoint of navigation

[5]

The Chicago Water Diversion Controversy, Marquette Law Review, Vol. 30, December 1946, No. 3, pp. 155, 156.

alone in such a waterway, too great a diversion of water would be a distinct injury rather than a benefit. It would increase the velocity of the current and increase the danger of overflow and damage to adjacent lands."

In a report made by the Division Engineer, North Central Division Corps of Engineers, United States Army, in January, 1957 on the subject "Effects of an Additional Diversion of Water from Lake Michigan at Chicago," it is stated:[6]

"184. Commerce on the Illinois Waterway has increased from a total of 1,695,120 tons in 1935 to 21,362,852 tons in 1955, the latest year for which statistics have been compiled. Recent studies of present and prospective water requirements for navigation on the Illinois Waterway show that the authorized diversion of 1,500 cubic feet per second from Lake Michigan is adequate to meet those requirements."

There is ample data contained in this report supporting the foregoing conclusion of the United States Corps of Engineers; consequently, there is no merit to the plea that additional water in the form of "domestic pumpage" should be diverted into this waterway for the purpose of maintaining navigation. Another facet of the problem of increased diversion is that such increase raises the velocity of the water in the Canal, which makes it more difficult for barges to navigate the Canal. This fact was also mentioned by Secretary of War Stimson in his memorandum of 1913.

In an article written by General P. D. Berrigan, formerly with the United States Corps of Engineers, which ap-

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[6]

85th Congress, 1st Session, Senate Document No. 28, p. 48.

peared in the November-December 1957 issue of the Military Engineer, under the title "Chicago Diversion from Lake Michigan," General Berrigan discusses the adverse effects of increased diversion on navigation in the Ship Canal, which were observed during the period from December 27, 1956 through February, 1957 (such increase having been permitted by an order of this Court) and states as follows:

> "Increased current velocities in channels of the Illinois Waterway during the period of increased diversion were of interest because of their effects on navigation. The relatively restricted reach extending from the junction of the Calumet-Sag Channel to the lock at Lockport was of particular interest. Normal velocities of a fraction of a mile per hour were increased to about 2 miles per hour. In this reach on December 24, a motor vessel lost control of several barges while rearranging its tow."

The result is that the Sanitary District of Chicago is riding both horns of a dilemma: it insists upon more water to be diverted into the Ship Canal to help dilute untreated or inadequately treated sewage and waste; and on the other hand, it is thereby causing an injury to navigation on the Ship Canal, which since 1933 has been a Federal navigable waterway. In view of this injury to Federal navigation, it would seem altogether proper that the Attorney General of the United States should be advised of the pendency of this petition and intervene in these proceedings for the purpose of protecting the paramount interests of the United States, both as to navigation and in the conduct of international affairs.

The State of Illinois and the Sanitary District Has Made Numerous and Repeated Attempts to Circumvent the Decree of this Court by Seeking Congressional Authorization of Increased Diversion for Sanitary Purposes.

Repeatedly bills have been introduced in Congress by congressional members from the State of Illinois, seeking to increase the diversion in violation of the decree of this court of 1930. Unless we be misunderstood, we hasten to assure this Court that we do not present this issue because we expect to stay the members of Congress from introducing such bills as they see fit. However, we believe it is within the province of this Court to consider this issue and make a clear and unmistakable declaration that such diversion for sanitation purposes, even though authorized and sanctioned by the Congress, would avail the State of Illinois and the Sanitary District nothing. The reasons for seeking congressional authorization of greater quantities of diverted water is to help the Sanitary District in diluting its untreated or inadequately treated sewage, as well as diluting sewage from industrial waste which is directly discharged into the Canal is evident from all the studies and reports that have been made on the subject. It has another purpose, that of increasing its income by increasing the hydroelectric energy generated by its power plant. Since the Canal does not require more than 1,500 c.f.s. for the maintenance of navigation, then obviously an additional diversion must be for non-navigational purposes. This was very clearly and emphatically pointed out in the veto message of President Eisenhower given verbatim in Paragraph IV of the petition. The question is, may Congress permit and authorize the diversion of water from the Great Lakes Basin into the Mississippi River Basin through this Canal for non-navigable purposes, and more specifically for sanitation and power purposes, to the direct injury and damage of the complainant States? It is our contention that when

this court held in its opinions that the State of Illinois and the Sanitary District could not divert water for sanitation purposes and that such diversion was for an "inadmissible purpose" it meant the diversion for such inadmissible purpose could not constitutionally be sanctioned. We have no quarrel at this stage of the proceedings in these cases to the diversion of such water as may be needed, not exceeding 1,500 c.f.s. to maintain navigation in the Sanitary and Ship Canal and the federally operated Illinois waterway, but we emphatically insist that the diversion of water from the Great Lakes Basin, for a purpose other than for maintenance of navigation, cannot be sanctioned, even by Congress, since intra-state sanitation is not a subject over which Congress has any constitutional jurisdiction.

Relief Requested by Complainant States

Complainant states request the Court to amend the decree of April 21, 1930 and grant them the following relief:

(1) That the State of Illinois and the Metropolitan Sanitary District of Greater Chicago be forthwith restrained and enjoined from discharging any of the treated effluents emanating from its sewage and industrial treatment facilities into the Sanitary and Ship Canal, and that said State of Illinois and the Metropolitan Sanitary District of Greater Chicago be required by mandatory injunction of this Court to return all of said effluent to the Great Lakes Basin from which it originally came in the form of "domestic pumpage," the aforesaid injunctions to be made effective at such times and under such terms as to this Court shall seem meet and just.

(2) That if such decree is not made forthwith, a Special Master be appointed to take testimony and evidence with respect to the issues contained in this petition and to re-

port with respect to the time, method, and manner in which the State of Illinois and the Metropolitan Sanitary District of Greater Chicago shall comply with Paragraph (1) of this prayer, and with respect to whether the Court should appoint a Permanent Master invested with such authority as he may require for the purpose of maintaining surveillance over the operation of the sewers, interceptors, and other sewage and water collecting facilities and the sewage disposal and industrial treatment plants and works operated by the Metropolitan Sanitary District of Greater Chicago.

Respectfully submitted,

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